

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SCOTT ALAN BALDWIN,

Defendant-Appellant.

UNPUBLISHED

September 23, 2003

No. 236855

Kalamazoo Circuit Court

LC No. 01-000491-FC

Before: Cooper, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder, MCL 750.316, and was sentenced to life imprisonment. He appeals as of right. We affirm.

Defendant first argues that the trial court abused its discretion when it denied defendant's motion for a new trial that was based on newly discovered evidence that another individual, Nutter, confessed to murdering the victim. To justify the grant of a new trial on the basis of newly discovered evidence, the moving party must show that: (1) the evidence itself, and not merely its materiality, is newly discovered; (2) the evidence is not merely cumulative; (3) including the new evidence on retrial would probably cause a different result; and (4) the party could not with reasonable diligence have discovered and produced the evidence at trial. *People v Cress*, 468 Mich 678, 692; ___ NW2d ___ (2003). This Court must look to the trial court's findings on each of these factors in order to determine whether the trial court abused its discretion by denying defendant's motion.

The trial court found that Nutter's potential involvement in the case was known at the time of trial and that the evidence of his alleged confession to his cellmates, Donald Russell and Tommy Melson, was, therefore, neither newly discovered nor unable to have been discovered through the exercise of reasonable diligence at the time of trial. To support this finding, the trial court noted that Nutter's name was included in the list of witnesses who were endorsed at the time the information in the case was filed and that his name was again included in the list of potential trial witnesses. But Russell and Melson did not communicate to authorities that Nutter had allegedly confessed until five days after defendant's conviction in this case. Additionally, Russell stated at the hearing on the motion for new trial that he did not know defendant and did not know who represented defendant at trial. No evidence was produced at either the trial or the evidentiary hearing on defendant's motion to suggest that anyone other than Russell and Melson were aware of Nutter's alleged confession. Under the circumstances, it would have been

impossible not only for defendant to have known of Nutter's alleged confession at the time of trial, but also for defendant to have discovered and produced evidence of this alleged confession at trial through reasonable diligence. The trial court clearly erred in finding that the evidence of Nutter's alleged confession was not newly discovered or that it could have been discovered and produced at trial through the exercise of reasonable diligence.

Despite this erroneous finding, the trial court correctly found that the evidence would not have made a different result probable on retrial. The strength of the evidence supporting a defendant's conviction may be considered in deciding whether a different result would be probable, *People v Higgenbotham*, 21 Mich App 489, 493-494; 175 NW2d 557 (1970), and the court may evaluate credibility in deciding a motion for new trial brought on the ground of newly discovered evidence. *People v Mechura*, 205 Mich App 481, 484; 517 NW2d 797 (1994).

The trial court found that Russell and Melon had motivation to fabricate Nutter's alleged confession and that this impacted the credibility of their testimony. The court also found that the testimony of Russell and Mellon was inconsistent not only with each other, but also with the evidence introduced at trial. The court found that Russell's and Melon's timing in coming forward, after details of the trial had been widely publicized and both men had admitted to closely following that coverage, further made their testimony suspect. Moreover, the court noted that Nutter denied the cellmates' allegations that he confessed to them, and that Nutter's girlfriend at the time provided an alibi for him. Based on these findings, the court implicitly found that the new evidence was not such as to make a different result probable on retrial and, therefore, denied defendant's motion.

The evidence supporting defendant's conviction was extremely strong. In light of the strong evidence against defendant in this case and the lack of credibility of the new witnesses, we find that the trial court correctly found that the newly discovered evidence was not such as would make a different result probable on retrial. *Cress, supra*. The trial court therefore reached the correct result. *People v Maynor*, 256 Mich App 238, 243; 662 NW2d 468 (2003).

Defendant next argues that the trial court abused its discretion when it denied defendant's request to discover those Silent Observer tips in which the informant requested anonymity.

There is no general constitutional right to discovery, *People v Elston*, 462 Mich 751, 765; 614 NW2d 595 (2000), and the prosecutor is generally not required to disclose the identity of confidential informants. *People v Cadle*, 204 Mich App 646, 650; 516 NW2d 520 (1994). But where the disclosure of an informer's identity or of the contents of his communication is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege enjoyed by the confidential informant must give way. *Cadle, supra*, quoting *Rovario v United States*, 353 US 53, 60-62; 77 S Ct 623; 1 L Ed 2d 639 (1957). Here, however, defendant made no showing that the disclosure of the contents of the anonymous Silent Observer tips was either relevant and helpful to his defense or essential to a fair determination of the case. Rather, the only reason proffered by defendant for his request was that "there *might* be other information in the hands of the law enforcement agencies and/or the prosecutor that [had] not been produced." More than a mere assertion that the police might have some additional information in their files on some unspecified topic that might be useful to the defendant is necessary to overcome the informant's privilege. Because defendant did not demonstrate a possible need for the information in the anonymous Silent Observer tip sheets, see, e.g., *People v Wyngaard*, 226

Mich App 681, 684; 575 NW2d 48 (1998), reversed on other grounds 462 Mich 659; 614 NW2d 143 (2000), the trial court did not abuse its discretion in denying defendant's motion with regard to those Silent Observer tips in which the informant requested anonymity.

Defendant next argues that he was denied the effective assistance of counsel at trial. Generally, to establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); and (3) that the resultant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

Defendant argues that defense counsel failed to retain or call certain unnamed witnesses, including expert witnesses, because of defendant's inability to pay for such witnesses. This Court's review of this question is limited to the existing record because defendant neither raised this issue in his motion for new trial nor requested a hearing on this question. *People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001). There is no evidence in the record to substantiate defendant's allegations and, therefore, we decline to address this issue further.

Defendant also argues that defense counsel failed to object when his involuntary statement was used against him. Because defendant did not question the voluntariness of his statement before the trial court, we are unable to determine on the record presented whether defendant's statement was voluntary. Nonetheless, there is no evidence on the record to indicate that the statement was admitted at trial or that any of the information obtained by police during the interrogation was introduced at trial.¹ Thus, defendant suffered no prejudice as a result of counsel's alleged failure to move to suppress the statement.

Any error in counsel's failure to bring a motion for new trial before sentencing based on newly discovered evidence is harmless in light of our conclusion that the trial court properly denied defendant's motion for new trial that was brought by defendant's appellate counsel.

Affirmed.

/s/ Jessica R. Cooper
/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly

¹ To the contrary, defendant tried unsuccessfully to have the statement admitted.